

## Ontario government does not guarantee the health or safety of residents in long-term care homes, legal document says

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A candlelight vigil is held outside Orchard Villa care home in Pickering, one of Ontario's hardest hit long-term care homes during the COVID-19 pandemic, on June 15, 2020.

MELISSA TAIT/THE GLOBE AND MAIL



The Ontario government does not guarantee the health or safety of residents in long-term care homes, it says in a legal document, denying responsibility for sickness and death in a proposed class-action suit filed on behalf of residents who contracted COVID-19, and their families.

In a pandemic that has killed 1,848 residents of long-term care homes in Ontario as of Monday, the province denies that anyone in the proposed class-action, including the families, “suffered any loss or damages.” And if they did, long-term care operators, not the government, are responsible, it says.

The Ontario Ministry of Long-Term Care funds, regulates, licenses and inspects the province’s 623 long-term care homes. The government is being sued for \$500-million plus punitive damages in a proposed class-action filed in the Ontario Superior Court in June. The amount includes damages for loss of companionship, and physical and mental suffering. The lawsuit said patients and their families were “traumatized.”

“It seems kind of insane to say the class hasn’t suffered any damages,” lawyer James Sayce of Koskie Minsky, which brought the lawsuit, said in an interview.

The lawsuit alleged that the province is to blame for lax oversight and “wanton and callous disregard” to the vulnerability of the frail elderly during the pandemic. It said the province was negligent in its regulation, oversight and control of the long-term care system, breached its fiduciary duty – the obligation it owes to the vulnerable to ensure they are cared for – and violated the constitutional rights to personal security and equality of the residents. The allegations have not been proven in court.

But the province, in its statement of defence filed on Monday, said it should not be held legally or financially responsible because there is no long-term care “system” it controls, and because it does not “act as a guarantor of [long-term care] residents’ health or safety.” It says that licensed operators, some for-profit, others run by municipalities or non-profits, are responsible for ensuring homes are safe and secure for residents.

The province is also relying on a law that took effect last summer that gives it immunity from lawsuits for negligence in the creation of good-faith policy decisions, such as how it oversees the nursing-home sector. The statement of defence says the province is also immune under the new law, the Crown Liability and Proceedings Act, from being sued over its exercise of regulatory powers, including its inspections and any actions taken after inspections.



A Globe and Mail investigation found that the Ministry of Labour routinely inspected seniors' homes by phone rather than in-person during the pandemic. The ministry is responsible for ensuring that employers comply with workplace health and safety standards.

While several lawsuits have been filed against private, for-profit owners of care homes that were hit hard by the novel coronavirus pandemic, just one class-action targets the provincial government for its supervision.

The province says it acted "as it thought best," by providing guidance and directives to the long-term care sector, emergency funding for infection prevention and extra beds, "pandemic pay" wage increases for front-line workers, personal protective supplies to homes, emergency orders that limited employees to working in one home and requesting assistance from the Canadian military for struggling homes.

The lawsuit said that Ontario was slow to address a chronic staff shortage, in preventing staff from working in more than one facility, in providing face masks and other personal protective equipment for front-line workers, and in ensuring ill residents were separated from others.

"Comparable jurisdictions like British Columbia took early, decisive action and suffered a fraction of Ontario's tragedy," the statement of claim said.

But the province says it is not required to regulate and oversee long-term care homes in the same manner as B.C. or other jurisdictions.

The lead plaintiff in the proposed class action is Doreen Nisbet, 89, a former resident of Orchard Villa in Pickering. Her son, Simon, was notified on April 22 she had tested positive. On May 3, an ambulance took her to Ajax Pickering Hospital at her son's request, and the lawsuit alleges she had by this time sustained kidney damage from dehydration.

A spokeswoman for the Long-Term Care Ministry said it is unable to comment because the court case is continuing.

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